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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS VALENZUELA,

Defendant and Appellant.

F077322

(Super. Ct. No. F16906824)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. F. Brian Alvarez, Judge.

Rachel Varnell, under appointment by the Court of Appeal, Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Franson, Acting P.J., Smith, J. and DeSantos, J.

INTRODUCTION

Appellant Jose Luis Valenzuela pled no contest to second degree robbery (Pen. Code, § 211¹) and assault with a semiautomatic firearm (§ 245, subd. (b)). Appellant also admitted that he personally used a firearm within the meaning of section 12022.53, subdivision (b), with regard to the count of second degree robbery and that he personally used a firearm within the meaning of section 12022.5, subdivision (a), with regard to the assault count. In exchange for his plea, appellant accepted a sentence of no more than 12 years. At sentencing, the trial court denied appellant's request to strike the firearm enhancements and sentenced appellant to a total of 12 years in state prison. The sentence was based on the lower term of two years for second degree robbery with an additional 10 years for the firearm enhancement under section 12022.53, subdivision (b). The court imposed the lower term of three years, plus an additional three years for the firearm enhancement as to the assault charge, but stayed the sentence pursuant to section 654.

On appeal, appellant raises a single claim. He contends that the trial court abused its discretion in denying his request to strike the firearm enhancements. Upon review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Relevant Facts

Appellant entered a Subway fast food restaurant and asked the employee if he could take a soda and pay for it later. The employee told him he had to pay for it first. Appellant left the store, stating he would come back. Appellant returned, pointed a handgun at the employee, and asked if anyone else was in the store. The employee told

¹ All further references are to the Penal Code, unless otherwise stated.

² The following facts are based on the testimony provided at the preliminary hearing.

him he could take whatever he wanted from the store. Appellant proceeded to take a bottled soda, and moved the tip jar, but did not take it or its contents, and eventually left.

Police were called and apprehended appellant approximately five to 10 minutes after the robbery. He was found 200 feet from the Subway and was in possession of a loaded semiautomatic handgun.

Sentencing Hearing

At appellant's sentencing hearing, the trial court heard arguments regarding the defense's request to strike the firearm enhancements. Defense counsel noted appellant's lack of criminal history and pointed to mitigating factors found in psychological reports.³ The prosecution argued that the trial court's indicated sentence of 12 years was appropriate because appellant pointed the firearm at the victim during the commission of the crime, and the traumatic impact of that action on the victim. The prosecutor noted that this was not a passive act, such as just showing the victim he was in possession of a gun, and therefore appellant's actions did not warrant the striking of the firearm enhancement.

In response, defense counsel explained that appellant was remorseful, no one was injured, and that appellant was "not in the right state of mind" at the time of the crime. The trial court denied appellant's request to strike the firearm enhancement and provided the following reasoning:

“[C]ertainly, the Court understands its discretion with 1385(c) and its ability to strike an arming allegation. And in reviewing SB 620, which gave -- or gives any trial Court now the ability to strike an arming allegation under 12022.53, the [L]egislature has explained in the Counsel's Digest that the bill would delete the prohibitions of striking an allegation or

³ Defense counsel had questioned appellant's competence to stand trial at an earlier hearing. In response, the court appointed psychiatrists to interview appellant. One of the psychologists opined that while appellant was competent to stand trial, there was evidence that appellant was in a psychotic state during the robbery based on methamphetamine induced intoxication.

finding and instead it would -- and instead would allow a Court in the interest of justice and at the time of sentencing or resentencing to strike or dismiss an enhancement otherwise required to be imposed by the above provision of law. And the Senate floor analysis also noted in the bill that SB 620 does not eliminate these enhancements. Instead, SB 620 allows a judge to exercise discretion on whether or not to make a long sentence longer if it is in the interest of justice. [¶] ... [¶]

“[T]he furtherance of justice standard under 1385 has been explained repeatedly, but probably most succinctly in *People v. Superior Court (Romero)* in the context of the furtherance of justice in striking prior serious felony allegations under the Three Strikes Law. It requires a Court to consider both the constitutional rights of the defendant and the interest of society represented by the People in determining whether there should be a dismissal. And at the very least, the reason for the dismissal must be that which would motivate a reasonable judge. Courts have recognized that society represented by the People have a legitimate interest in the fair prosecutions of crimes properly alleged. From these general principles, it follows that a Court abuses its discretion if it dismisses a case or strike or sentencing allegation solely to accommodate judicial convenience because of court congestion. The Court also abuses its discretion by dismissing a case or sentencing allegation simply because a defendant pleads guilty. Nor would a court act properly if guided by solely -- by a personal antipathy for the effect that the Three Strikes Law will have on a defendant while ignoring the defendant’s background, the nature [of] the present offenses and other individualized considerations.

“What we have in this case is we have a situation not merely where the defendant lifted his shirt and exposed a gun to facilitate a robbery, thereby using it in that manner, in a more passive manner. Rather here, instead, the defendant, Mr. Valenzuela, walked up to the business counter, he took a bladed stance. He raised his right hand while holding the gun with the hammer cocked back and pointed the gun at the victim. The gun was later determined to be a loaded nine[-]millimeter firearm. Notwithstanding his drug use arguments, the prior 5150 commitments for his drug use and any lack of prior felony convictions, the Court is of the opinion that this is not a case where the personal arming allegation should be stricken. I’m working from the premis[e] as a sentencing Court that the sentencing norm calls essentially for applying the gun allegation unless there’s some furtherance of justice to be -- to have it stricken. The sentencing norm would be the application of the 10-year enhancement for the use of the gun.

“Accordingly, the Court will deny the request to have 1385 relief in Count One to strike the arming allegation, likewise as to Count Two in the arming allegation.”

DISCUSSION

Appellant contends that the trial court abused its discretion in denying the request to strike the enhancements. Appellant argues that the court failed to properly weigh the findings of the psychologists regarding appellant’s drug dependence and resulting drug induced psychosis. He notes that the findings of the psychologists are supported by the facts of the robbery in which appellant acted strangely and did not take any money from the store. As appellant committed the robbery while in a drug induced psychotic state, appellant believed that he was less culpable and more sympathetic than an ordinary defendant and the court’s decision not to strike the enhancement fell outside the bounds of reason.

Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620) amended sections 12022.5 and 12022.53, effective January 1, 2018. Those sections create various sentence enhancements for defendants who use firearms during the commission of a felony or attempted felony. Prior to the passage of Senate Bill 620, imposition of the enhancements was mandatory; trial courts were prohibited from striking or dismissing allegations under these sections. (Former §§ 12022.5, subd. (c), 12022.53, subd. (h).) Senate Bill 620 removed that prohibition and granted trial courts express authority to strike or dismiss applicable firearm enhancements at the time of sentencing. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678.)

Here, sentencing occurred on February 22, 2018, after the date that Senate Bill 620 went in effect. The trial court was aware of the change of the law, and after weighing the rights of the appellant and the societal interests involved, declined to exercise its discretion to strike the enhancements. Accordingly, we must determine whether the exercise of the court’s discretion to decline to strike the enhancements was proper.

Senate Bill 620 amended sections 12022.5 and 12022.53 to state: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

“A trial court’s power to dismiss under section 1385 may be exercised only “in furtherance of justice,” which mandates consideration of “the constitutional rights of the defendant, and the interests of society represented by the People.”” (*People v. Clancey* (2013) 56 Cal.4th 562, 580, italics omitted.) “At the very least, the reason for dismissal must be “that which would motivate a reasonable judge.”” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 (*Romero*); *People v. Orin* (1975) 13 Cal.3d 937, 945.) Moreover, a court’s decision whether or not to exercise this power is subject to review for abuse of discretion. (*Romero, supra*, 13 Cal.4th at p. 530; *People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*) [As the decision to strike a sentencing allegation or decline to strike “are flip sides of the same coin, we see no reasoned basis for applying a different standard of review to a court’s decision not to strike.”].)

“In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

Appellant contends that the court abused its discretion by not placing greater weight on the opinions provided by the psychologists that indicated that appellant may have been suffering from paranoia and psychosis as a result of his methamphetamine and marijuana abuse, which impacted his ability to premeditate, deliberate, and consider the consequences of committing the crime. Additionally, appellant argues that the opinions of the experts are supported by the factual circumstances of the robbery in which appellant did not attempt to take any money from the store. However, in rendering its decision, the court specifically took each of these factors into account and found that they were outweighed by the conduct of appellant in committing the robbery. The court noted that the gun was not used in a passive manner, but rather appellant raised the gun with the hammer cocked back and pointed it at the victim.

We have no reason to hold that the trial court's decision was so irrational or arbitrary that no reasonable person could agree with it. (*Carmony, supra*, 33 Cal.4th at p. 377.) Even if we disagreed with the decision of the trial court, which we do not, we are neither authorized nor warranted to substitute our judgment for that of the trial judge. The trial court did not abuse its discretion in refusing to strike the gun use enhancements under sections 12022.5 and 12022.53.

DISPOSITION

The judgment is affirmed.